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Supreme Court, U.S.
FILED
MAR 29 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 749

FRANCISCO ROMERO,

Petitioner,

—against—

GARCIA & DIAZ, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

PHILIP F. DiCOSTANZO
Attorney for Petitioner
66 Court St.
Brooklyn 1, N. Y.

NARCISO PUENTE, JR. and
SILAS B. AXTELL, Esqs.

By: DiCOSTANZO, KLONSKY & SERGI, Esqs.
Of Counsel

ROBERT KLONSKY, Esq., *On Reply Brief*

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Respondent's brief demonstrates an understanding that the instant appellate opinion below has found for petitioner on the major issues of fact and the purpose of the remand as joined at trial. By assailing the concurrent finding of the District and Circuit Courts below, through re-argument of what it had originally contended that had been unanimously rejected, it must be inferred that respondent properly recognizes it should not succeed on what has been established as the evidentiary basis favoring petitioner. There are manifest errors in references to the record and the opinions below by respondent's brief which deserve concise comment, as follows:

1. The instant Court of Appeals' opinion and new findings cannot be determined as properly drawn from a trial *de novo*. Again respondent goes to the evidentiary basis, even beyond that recited by the Court of Appeals, which conceded, under the circumstances of the carpenters being present in the area, that there was an insufficient complement of crew members. What should be accepted as true

are the facts found by the trier, not by the Court of Appeals which did not have the opportunities of observation and assessment of credibility. Where respondent again refers to a radio cable that was not produced and which the Court of Appeals conceded could not be the basis to support respondent's contention that the timing of arrival by longshoremen was determined by the ship's officers; and where respondent's brief would limit the issues solely to petitioner's version of the occurrence related to the kink in the wire, without reference to the record as a whole, as to the interfering presence of shore carpenters compounded by the delayed boarding of longshore riggers; and where respondent attempts to fully present the testimony of Suarez again, concededly not worthy of belief, it is apparent that the evidentiary basis already established by the opinions below are more limited than respondent realizes is necessary to support its position on this petition.

2. The nature of the remand and the pre-trial decision by Sugarman, *D.J.*, is misconstrued in respondent's brief.

No limitation on the remand as regards proof of negligence can be read in the opinion by this learned Court, nor that of the pre-trial Court's first opinion prior to certiorari. The pre-trial decision relates solely to the jurisdictional tandem of employer-employee relationship and the Jones Act (46 U. S. C. 688). Where the words of art "operation and control" appear in the opinion of remand, it is apparent that they were related solely to the rights of a warranty of seaworthiness and maintenance and cure as well as the Jones Act against the owner of the vessel, and were determined not to be to the extent required for the employment relationship, a *sine qua non* for assertion of the Jones Act. This is also apparent on studying the first opinion by Sugarman, *D.J.* at 142 F. Supp. 570, wherein is pertinently stated the following:

> "There was no proof adduced at the pre-trial hearing of management, operation and control by Garcia *except as it might arise by virtue of the agency agreement.* Nor did plaintiff offer any proof of any negligent act by defendant Garcia within the scope of the agency, contributing to the injury" (P. 573 of 142 F. Supp., italics supplied).

The Jones Act claim against Garcia & Diaz was then dismissed because it was held to be an agent for the shipowner, not an employer of Romero. As the proof presented at the pre-trial hearing was necessarily of a different nature and purpose than it would have been during a full trial on the merits, the first opinion also refers to plaintiff refusing to elect a trial on the merits in the Admiralty against the resident defendant as a basis for the dismissal of the complaint. Certainly there would have been further evidence as to the nature of the agency, respondent's measure of control, the role of Suarez (a pier superintendent by self-designation, and "coordinator," as conceded in the instant Court of Appeals opinion but again denied by respondent's brief), and respondent's relationship to the arrival and work stations of contractors and other factors of the accident involved, had Romero elected to proceed in the Admiralty. It follows that Romero's rights to fully present proof on these factual issues were not deemed aborted by the remand, and on this issue was favored by the instant Court of Appeals' opinion.

3. Respondent improperly compares this Court's opinion in *McAllister* v. *United States*, 348 U. S. 19, to contend inasmuch as the wartime agent was not held liable, likewise respondent herein should be exonerated.

The underlying concern in the first *McAllister* decision was the effect of a civil action under the Jones Act by sea-

men against general agents hired under the wartime form of agency agreement designated as GAA 4-4-42. Major considerations to obviate strikes and work stoppages, to insure sovereign immunity for the vessels, to avoid their seizure and taxation by local authorities, and to preserve wartime secrecy by confining all litigation concerning their operations to the *in camera* cloak of the Admiralty, compelled the denials of Jones Act suits against shoreside agents as owners *pro hac vice* of United States cargo vessels engaged in wartime operations. Respondent cannot contend that it and its Spanish principal are beneficiaries of this public policy decision. If public policy is to be invoked it should be in favor of petitioner herein.

It is axiomatic that an agent with general powers should know and has a duty to know of dangerous conditions created by shoreside personnel positioned by it at work stations where an inadequate crew must perform a hazardous function. On this basic issue the instant Court of Appeals opinion erroneously holds there is no duty, as set forth on page 12 of respondent's brief. The case of *In Re Sanford Fork & Tool Company*, 160 U. S. 247 (1895), recited at page 18 of respondent's brief, also cannot be read to have any significant effect. The remand here was to determine a question of negligence of the agent by the trier of the facts in the District Court, and not to the Circuit Court on some issue of law. This 1895 decision cannot be cited to limit this Court's purpose as defined in *McAllister, supra.*

4. Despite respondent's repetition that the Court of Appeals did not go into the evidentiary facts but only to conclusions of law, it is apparent that the bulk of the appellate opinion below relates itself to different findings of fact and seeks support therefrom in the testimony of witnesses who spoke on both sides of the factual issues in-

volved. Again respondent seeks comfort in some of the testimony by Suarez, as did the Court below, though inconsistently the opinion below pointedly remarked that the District Court was justified in treating the credibility of Suárez as less than wholesome. Clearly this basic issue on the facts relates itself to credibility, conceded to be so in the Court of Appeals opinion, but disregarded in its "free review" of the record. This "free review" does not touch upon much of the evidence that supports petitioner's position.

Respondent refers obliquely to the conditional settlement for $25,000 with the less culpable Quin Lumber Co. It should be noted that the balance due on hospital and medical bills, set forth in the initial findings as over $2,700.00 (235a of Appellant's Appendix below), despite respondent's initial admission of responsibility therefor, and that this was tried as a separate issue, will be deducted from the $25,000.00 deposited in escrow with the Clerk of the District Court. Respondent has also entered costs with the District Court in the total sum of $4,723.49, also to be deducted from the $25,000.00, additional to all the costs incurred by petitioner since the start of litigation. Obviously the conditional settlement is not sufficient nor intended to be the equivalent of damages due and owing from respondent, the primary tort feasor. Parenthetically, though several maritime specialists and legal associations desire to file briefs *amicus* in favor of petitioner, respondent refuses to consent though assured of reciprocal consent.

Entirely unproved and irrelevant is respondent's reference to the pittance petitioner might have received in Spanish compensation law, based on his monthly wages of $9.00, assuming the lapse of time for his claim and his permanent residence here with intention to become an American citizen would allow it.

CONCLUSION

Respondent's brief fortifies petitioner's contention that the Court of Appeals had gone far beyond the limitations expressed by this Court in the second *McAllister* opinion, and is in disregard of the purpose and intent of the remand for the trier of the facts to find whether the agent was liable in negligence, which it was. The national and international significance of this case is fully discussed in the petition and will not be amplified upon. To deny Romero his rights by reason of the argument set forth in respondent's brief, which desperately goes even beyond the new findings by the Court of Appeals, would be the equivalent of giving support to an apparent miscarriage of justice.

Respectfully submitted,

PHILIP F. DICOSTANZO
Attorney for Petitioner

NARCISO PUENTE, JR. and
SILAS B. AXTELL, Esqs.

By: DICOSTANZO, KLONSKY & SERGI, Esqs.
Of Counsel

ROBERT KLONSKY, Esq., *On Reply Brief*